IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

2018: No. 21

BETWEEN

DENZIL NELSON

Appellant

and

FIONA MILLER

Respondent

JUDGMENT[1]

Appeal against conviction in the Magistrates' Court-Whether it is a valid defence to a charge of being in care or control of a vehicle under section 35A of the Road Traffic Act 1947 for a Defendant to establish absence of an intention to drive the vehicle- Does section 35A of the Road Traffic Act 1947 create a rebuttable presumption a Defendant can discharge by establishing on a balance of probabilities there was no intention to drive the vehicle-When is the presumption of being in care or control of a vehicle in section 35H of the Road Traffic Act 1947 engaged-Does the presumption in section 35H of the Road Traffic Act infringe the presumption of innocence in section 6 of the Bermuda Constitution Order 1968

Date of Hearing: November 8, 2018

Date of Judgement: January 21, 2019

[1] This judgment was circulated to the parties without a formal hearing

Mr Gordon Woolridge, Phoenix Law Chambers for the Appellant

Ms Shaunte Simons, Department of Public Prosecutions for the Respondent.

Introduction

1. At approximately 4:20 am on Sunday 24th December 2017, Denzil Nelson and his companion, Naomi Wilson, drove into the Ice Queen Restaurant parking lot on South Road Paget in a white Hyundai vehicle registration number 41006.

2. Mr Nelson and Miss Wilson purchased food and picked up condiments from Ice Queen and walked back to their vehicle. Miss Wilson sat in the front passenger seat, and Mr Nelson sat in the driver's seat of the vehicle. Mr Nelson put the keys in the ignition turned the key, and the vehicle headlights came on.

3. Police Constables Anton Gilbert and Daischun Chin observed Mr Nelson walk unsteadily on his feet from the Ice Queen Restaurant to his vehicle. The two police officers approached Mr Nelson. While speaking to Mr Nelson, they smelt intoxicants on his breath and noticed his eyes were glazed and his speech slurred. PC Gilbert asked Mr Nelson whether he had been drinking to which he replied: “I had two drinks". PC Gilbert then informed Mr Nelson he had grounds to believe he had care and control of his vehicle while impaired and was being arrested.

4. The police officers demanded samples of Mr Nelson's breath to which he complied. Breath analysis of the lower of the two readings taken found Mr Nelson had 131 mg of alcohol in 100 ml of blood.

5. Mr Nelson was charged with two offences:

    1. On the 24th day of December 2017, in Paget Parish, did have care and control of motor vehicle registered number 41006 in a public place namely Ice Queen Parking Lot whilst your ability to do so was impaired by alcohol.

        Contrary to Section 35AA of the Road Traffic Act 1947

    2. On the 24th day of December 2017, in Paget Parish, did have care and control of motor vehicle registered number 41006 in a public place namely Ice Queen Parking Lot after consuming so much alcohol that the proportion of it in your breath exceeded the prescribed limit.

        Contrary to Section 35A of the Road Traffic Act 1947

6. The trial in the Magistrates' Court took place on April 19, 2018, before the Worshipful Khamisi Tokunbo. The Learned Magistrate rejected the defence that Mr Nelson had demonstrated he had no intention to drive the vehicle and convicted him on Count 2 of the information. The Learned Magistrate imposed a fine of $1500 and disqualified Mr Nelson from driving all vehicles for 18 months. In the concluding paragraph of his extempore judgment the Learned Magistrate said:

> *"In my view, the mischief, and intent to drive is made out on the evidence of the defendant sitting in the driver's seat, the engine started and the vehicle lights on. The Defendant had the immediate ability and intent to drive. I do not accept that he was going to vacate the driver's seat and that the lady was going to drive; and that he was sitting in the driver's seat simply to eat food. Accordingly I am satisfied, so I feel sure that as regards Count 2 the defendant is guilty as charged."*

7. Mr Nelson now appeals his conviction on two grounds:

    1. The Learned Magistrate made fundamental errors in law and facts with respect to his determination with glaring inconsistencies in the evidence between the two police witnesses.

    2. Further, the Learned Magistrate failed to consider the defence adequately or at all when at least one of the police witnesses' evidence corroborated the defence.

8. Ordinarily, an appeal against a conviction under Section 35A of the Road Traffic Act 1947 ("the RTA 1947") would not warrant such a fulsome judgment. However, on appeal, Mr Woolridge has raised an argument he did not advance before the Magistrates' Court during the trial. Mr Woolridge now contends that the evidence which established Mr Nelson sat in the driver's seat imposed a rebuttable presumption ("presumption") upon Mr Nelson that he was deemed to be in care or control of the vehicle contrary to section 35A of the RTA 1947.

9. Mr Woolridge argues that the presumption shifted the burden to Mr Nelson to show he did not have care and control of the vehicle. On this platform, Mr Woolridge makes the following points:

    (1) The effect of the presumption confirms there is a mental element contained in the offences under section 35A of the RTA.

    (2) The *mens rea* for the care or control offence under section 35A of the RTA is an intention to drive.

(3) Once the presumption was engaged, Mr Nelson was deemed to be in care or control of the vehicle.

(4) Mr Nelson adduced evidence at trial to show on a balance of probabilities he had no intention to drive the vehicle.

(5) At this point, the Prosecution was required to prove beyond a reasonable doubt that Mr Nelson possessed the requisite *mens rea* for the offence by establishing he intended to drive the vehicle.

(6) Mr Woolridge contends the Prosecution failed to discharge its legal burden of proof by failing to establish Mr Nelson intended to drive the vehicle. Therefore, this appeal should be allowed.

10. The grounds of appeal and the oral arguments Mr Woolridge made during the appeal raise the following points for determination by this Court. First, what are the *mens rea* and *actus reus* for the care or control offence under section 35A of the RTA 1947? On this question, I rule that the *mens rea* is the intent to assume care or control of the vehicle after voluntarily consuming alcohol and the *actus reus* is the acts of voluntarily consuming alcohol and then assuming care or control of the vehicle.

11. Second, does section 35A of the RTA 1947 create a rebuttable presumption that the person sitting in the passenger seat of the vehicle is in care or control of the vehicle? In my view, section 35A of the RTA 1947 does not create the presumption for which Mr Woolridge contends. However, section 35H of the RTA 1947 does create a rebuttable presumption that the person occupying the seat ordinarily occupied by the driver of a vehicle shall be deemed to have care or control of the vehicle.

12. Third, was the presumption correctly relied upon in this case either at trial or on appeal? In my view, the presumption in section 35H of the RTA 1947 was not correctly relied upon at trial nor during the appeal.

13. The fourth question is whether the evidence adduced at trial established factual inconsistencies between the evidence of the two police officers which demonstrated that Mr Nelson had no intention to drive the vehicle? In my view, this question does not address the central issues the Court must consider, namely whether Mr Nelson intended to assume care or control of the vehicle and if he did possess that intention, whether he went on to actually assume care and control of the vehicle. On these two questions, I find there are no material inconsistencies between the evidence of the two police officers and the testimony of Mr Nelson. I have reviewed the findings of the Learned Magistrate and, in my view, the evidence clearly supports the conclusions he made. Accordingly, I dismiss the appeal.

What are the *mens rea* and *actus reus* for an offence under section 35A of the RTA 1947?

The legal framework

14. Section 35A of the RTA 1947 is substantially the same as section 236(1) of the Canadian Criminal Code (CCC) 1970. I should add that section 236(1) of the CCC has been amended. The most recent version of section 236(1) of the CCC brought to my attention is now found in section 253 of the CCC 1985. The content and structure of the amended section of the CCC 1970 have changed. However, the amended section still contains the prohibition on being in care or control of a motor vehicle with excess alcohol in the blood or while impaired. The Canadian authorities which assist with interpreting section 35A of the RTA 1947 refer to section 236(1) of the CCC 1970. Sections 35A of the RTA 1947 and 236(1) of the CCC 1970 are reproduced below:

Driving when alcohol concentration is over the prescribed limit

35A *Any person who drives or attempts to drive, or who has care or control of, a vehicle on a road or other public place, whether it is in motion or not, having consumed alcohol in such quantity that the proportion of it in his blood exceeds the prescribed limit, commits an offence*.

236. (1) Canadian Criminal Code

Everyone who drives a motor Vehicle or has the care or control of a motor vehicle, whether it is in motion or not, having consumed alcohol in such quantity that the proportion thereof in his blood exceeds 80 milligrams of alcohol in 100 milliliters of blood, is guilty of an indictable offence or an offence punishable on summary conviction....

15. Both counsel helpfully cited Canadian Supreme Court authorities discussing sections 234(1) and 236(1) of the CCC 1970. Both sections of the Canadian legislation deal with care or control offences. In *Ford v. The Queen, [1982] 1 SCR 231 1982; Can LII 16 (SCC),* at page 248 Richie J writing for the majority of the court said:

> *" Nor, in my opinion, is it necessary for the Crown to prove an intent to set the vehicle in motion in order to procure a conviction on a charge under s.236(1) of having care or control of a motor vehicle, having consumed alcohol in such quantity that the proportion thereof exceeds 80 milligrams of alcohol in 100 millilitres"*

And in the case of *The Queen v Toews, [1985] 2 SCR 119; 1985 Can LII 46 (SCC),* dealing with a section 234(1) offence the Court held:

" The offence of having care or control of a motor vehicle while impaired is a separate offence from driving while impaired and may be committed whether or not the vehicle is in motion. The mens rea is the intent to assume care or control after voluntarily consuming alcohol or a drug, and the actus reus is the act of assuming care or control. An absence of an intent to drive does not of itself afford a defence. The Crown, given the facts, could not rely on the presumption of control arising out of the accused's occupying the driver's seat and had to rely on evidence showing control.

Acts of care or control, short of driving, involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion. Respondent was unconscious and clearly not in de facto control, and his use of the sleeping bag supported the contention that the truck was merely a place to sleep. He was not occupying the driver's seat, and no adverse inference could be drawn from the ignition key evidence. Since Respondent was not shown to have performed any acts of care and control, he did not perform the actus reus."

16. Counsel did refer me to the United Kingdom authority *Director of Public Prosecutions v. Watkins [1989] Q.B. 821.* This case turns on the interpretation of sections 5 and 6 of and Schedule 4 to, the Road Traffic Act 1972, as substituted by section 25 of, and Schedule 8 to, the Transport Act 1981. These sections are now amended and found in section 4 (2) of the Road Traffic Act 1988. These sections address the offence of being "in charge" of a vehicle on a road or public place when unfit through drink or drugs.

17. One must be careful applying the dicta in *Watkins* and cases interpreting the same legislation because the offence of being “in charge" of a vehicle is a potentially wider concept than being in "care or control" of a vehicle. In order to establish the offence of being "in charge" of a vehicle, the Crown merely has to prove some connection between the defendant and the vehicle on a road or public place. The quantum of proof can be less than what is required to prove the defendant attempted to drive. By way of example, a person who had recently driven the vehicle would be “in charge" unless he put the vehicle in someone else's charge or unless there was no realistic possibility of the person resuming control of the vehicle.

18. *Watkins* does provide a list of circumstances directed at determining whether a defendant is “in charge" of a vehicle. In my view, when considering an offence contrary to section 35A of the RTA 1947, the list of circumstances in *Watkins* is only relevant to the extent it addresses and aids determination of the *actus reus* of the offence, namely whether the defendant assumed care or control of the vehicle.

19. With the above caveat in mind, on page 9 of *Watkins,* Taylor L.J. enumerated the following to aid in determining whether the defendant is "in charge" of the vehicle:

"(i) Whether and where he is in the vehicle or how far he is from it

(ii) What he is doing at the relevant time

(iii) Whether he is in possession of a key that fits the ignition

(iv) Whether there is evidence of an intention to take or assert control of the car by driving or otherwise

(v) Whether any other person is in, at or near the vehicle and if so, the like particulars in respect of that person."

20. Mr Woolridge contended the mental element for an offence contrary to section 35A of the RTA is an intention to drive a vehicle and quoted the judgement of Laskin C.J and Dickson on page 232 of the *Ford* case. Mr Woolridge also relied upon the judgment of the Court in *Toews* which set out the *actus reus* for the offence of care or control of a vehicle. Miss Simons relied upon *Toews* and in particular paragraph 7 of the judgment which reiterates the Court's summary finding at the start of the judgement.

Conclusion on *mens rea* and *actus reus* for section 35A of the RTA 1947

21. Sections 234(1) and 236(1) of the CCC 1970 contain the words "care or control" in respect of the offences of driving with excess alcohol in the blood and driving while impaired. These sections are not identical to section 35A of the RTA 1947; however, the differences in wording are not material. Therefore, the Court can rely upon the Canadian authorities to assist the interpretation of being in "care or control" of a vehicle in section 35A of the RTA 1947.

22. I adopt the reasoning found in the Canadian cases of *Ford* and *Toews* and find that an intention to drive is not an element of the offence of being in care or control of a vehicle on a road or other public place contrary to section 35A of the RTA 1947. Mr Woolridge relies upon the judgment of Laskin C.J and Dickson in which they said that an intention to set the vehicle in motion is an essential element of an offence under section 236 of the CCC 1970. However, it is important to note the judgment handed down by Laskin C.J and Dickson J was not the decision of the court; they delivered minority judgments. Ritchie J gave the majority judgment of the court in the *Ford* case which rejected the argument that section 236(1) of the CCC 1970 included a requirement that the prosecution must prove the defendant intended to drive the vehicle.

23. I find that the *actus reus* of an offence contrary to section 35A of the RTA is the act of assuming care or control of the vehicle after the voluntary consumption of alcohol.

24. Section 35A of the RTA 1947 also contains the offences of driving or attempting to drive a vehicle having consumed alcohol in such quantity that the proportion of it in the blood is over the prescribed limit. This judgment does not address nor attempt to resolve the legal test for these offences.

Does section 35A of the RTA 1947 create a rebuttable presumption and, if so, was the presumption engaged?

The law

25. On its face, section 35A of the RTA 1947 does not contain words creating a presumption, rebuttable or otherwise. Further, section 35A of the RTA 1947 does not contain anything resembling the presumption found in section 237(1) of the CCC 1970, now found in the amended section 253 of the CCC 1985.

Section 237 (1) of the CCC 1970 reads:

In any proceedings under section 234 or 236
(a) Where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion

Section 35H of the RTA does contain a presumption similar in terms to the presumption found in section 237 (1) of the CCC 1970. Section 35H reads as follows:

Proceedings under sections 35, 35AA, 35A or 35B
The provisions of this section apply to any proceedings under section 35, 35AA, 35A or 35B.

In any such proceedings, where it is proved that the accused occupied the seat ordinarily occupied by the driver of a vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes by a preponderance of evidence that he did not enter or mount the vehicle for the purpose of setting it in motion.

26. The Canadian cases of *Ford* and *Toews* provide helpful dicta which explain the operation of section 237(1) of the CCC 1970, which in turn assist in interpreting section 35H of the RTA 1947.

On page 246 of *Ford*, Ritchie J, adopting the judgment of McQuaid J in the Court of Appeal for Prince Edward Island said the following:

> *"There can be no doubt that if the case for the Crown rests solely upon proof that the accused occupied the seat ordinarily occupied by the driver, he is not*

deemed to have had care and control of the vehicle if he can establish that he did not enter or mount it for the purpose of setting it in motion. In the latter event, the presumption is rebutted, and the crown is deprived of the advantage of the deeming provision of s. 237(1) (a). In practical terms the only result of the accused having established that he did not mount the vehicle for the purpose of setting it in motion, is that the Crown is seized with the burden of proof without the aid of the presumption. The latter words of s. 237(1) (a) are in my view definitive of the evidence required of the accused in order to shift the burden of proof back to the Crown, but I cannot see that they purport to create or define a defence to the charge or alter the nature of the offence created by s. 236 so as to import " an intention to drive" as an essential element which the Crown is required to prove in order to secure a conviction under section 236."

"... S 237(1)... creates, under certain specific circumstances, a burden on the accused to rebut a prima facie case or a presumption created by statute. The section has no application (1) unless the accused is found occupying the driver's seat and (2) unless the Crown elects to invoke the section. The Crown may rely upon other evidence to prove care and control, in which case the section has no applicability."

And on page 247:

" I have also had the benefit of reading the reasons for judgment delivered by Jessup J.A. on behalf of the Ontario Court of Appeal in R V McPhee; R V Mullen (1975), 30 C.R.N.S.4 and I note his conclusion that: ...if the only proof offered by the Crown of care and control is the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, and the accused establishes that he did not enter or mount the vehicle for the purpose of setting it in motion, the accused must be acquitted.

With all respect this amounts to nothing more than saying that where the Crown is relying exclusively on the presumption and the presumption is rebutted, there is then no evidence left for the prosecution and the accused must be acquitted. There can in my view be no denying the force of this reasoning."

27. On page 6 of the *Toews* case, McIntyre J delivered the unanimous judgement of the Court and said:

“In proving its case, the Crown must establish the presence of impairment by evidence in the usual way and the element of care or control may be established either by reliance upon the presumption in s.237 (1), where it is

applicable, or by showing actual care or control without reliance upon the presumption: see R v. Donald, supra, per Tysoe J.A, at p149."

28. I say in passing, that although section 237(1) required the accused to prove on a balance of probabilities that he did not enter the vehicle with the intention of setting it in motion, it has been held the reverse onus effect of the presumption is a reasonable limit on the guarantee to the presumption of innocence in section 11(d) of the Canadian Charter of Rights and Freedoms and is therefore valid. *R V Whyte, [1988] 2 S.C.R. 3, 42 C.C.C (ed) 97.* This reasoning has implications for how this Court would interpret the effect of the reverse onus provision in section 35H of the RTA 1947 on the presumption of innocence contained in section 6(2)(a) of the Bermuda Constitution Order 1968. However, this question is not properly before me and counsel has not addressed me on the point. I, therefore, make no ruling on this point and do not need to resolve the question to decide this appeal.

29. Mr Woolridge did not rely upon any presumption in or in relation to section 35A before the Learned Magistrate. Mr Woolridge raised the presumption for the first time during his argument in the appeal. He contends that section 35A of the RTA 1947 imposes a rebuttable presumption upon the Defendant that if he is sitting in the driver's seat, the Defendant is in care or control of the vehicle. The Defendant must discharge the burden on a balance of probabilities and can do so by demonstrating he had no intention to drive the vehicle. Miss Simons submitted the presumption did not apply in Bermuda and was not engaged in this case.

Conclusion on rebuttable presumptions and section 35A of the RTA 1947

30. In my view, section 35A of the RTA 1947 does not create the presumption for which Mr Woolridge contends. However, section 35H of the RTA 1947 does create a rebuttable presumption that the person occupying the seat ordinarily occupied by the driver of a vehicle shall be deemed to have had care or control of the vehicle.

31. The defendant can rebut the presumption in section 35H of the RTA 1947 by proving on a balance of probabilities that he did not assume care or control of the vehicle. The burden of proof would then shift to the prosecution to prove the ingredients of the offence beyond a reasonable doubt.

32. In this case, the Prosecution did not rely upon the rebuttable presumption in section 35H of the RTA. Accordingly, Mr Woolridge cannot rely upon the presumption, which I understand he sought to rely upon to establish the Prosecution was obliged to prove beyond a reasonable doubt the Defendant intended to drive the vehicle.

33. More simply put, the whole edifice for Mr Woolridge's argument on intention falls away for three reasons. First, the requisite state of mind for the care or control offence under section 35A of the RTA 1947 is not an intention to drive. The requisite state of mind is an

intention to assume care or control after the voluntary consumption of alcohol. Second, the Prosecution did not rely upon the presumption in section 35H of the RTA 1947. Third, as a matter of law and practice, the Defendant cannot direct the Prosecution on how to present its case under section 35A of the RTA 1947 by relying upon the presumption when the presumption is not invoked by the Prosecution.

Did the evidence adduced by the Prosecution at trial contain factual inconsistencies that demonstrated Mr Nelson had no intention to drive the vehicle?

34. Mr Woolridge highlighted evidence that the Defendant did not have the requisite intent to drive the vehicle. In support of that argument, he contended there were factual inconsistencies between the evidence adduced by the police officers which the Learned Magistrate did not take into account in his ruling. The main contention Mr Woolridge made is that PC Chin corroborated the Defendant's testimony that food was placed on the dashboard of the vehicle by the Defendant and Miss Wilson. However that evidence was not corroborated by PC Gilbert.

35. Mr Woolridge argued that because the Defendant and Miss Wilson were about to eat a meal in the car, this evidence amounts to an intervening factor because Miss Wilson drove the vehicle into the Ice Queen parking lot and would drive the vehicle when they finished eating. I should add that Miss Wilson did not give evidence at the trial.

36. Mr Woolridge also contended that although the Defendant placed the keys in the ignition of the vehicle and turned the radio on, the headlights came on automatically.

37. Miss Simons submitted that the judgment of the Learned Magistrate considered the evidence regarding eating food adduced by the Defendant and Miss Wilson. However, the Learned Magistrate did not accept that the evidence demonstrated the Defendant intended to vacate the driver's seat and Miss Wilson would then drive the vehicle.

38. Miss Simons concluded her submissions by asserting that the Learned Magistrate did not fail to take account of inconsistencies in the evidence. The Learned Magistrate did consider the evidence of the defendant and both police officers and rejected the defendant's explanation for the reason why he did not immediately inform the officers he did not intend to drive the vehicle.

Conclusion on factual inconsistencies in the evidence

39. I do not accept the submissions made by Mr Woolridge in respect of inconsistencies in the evidence. The submissions turn on the argument that the Prosecution had to prove the Defendant intended to drive the vehicle. In my view, the law does not support the necessity for the Prosecution proving an intention to drive to secure a conviction for the care or control offence in section 35A of the RTA 1947. Further, Mr Woolridge's

submissions are based on the Defendant rebutting a presumption upon which the Prosecution did not rely.

40. The Prosecution was required to prove beyond a reasonable doubt that the Defendant intended to assume care or control of the vehicle after the voluntary consumption of alcohol. The Learned Magistrate accepted that the Defendant's breath analysis reading was 131 mg of alcohol in 100 ml of blood and that he sat in the driver's seat of the vehicle. The Learned Magistrate then found that the defendant actually assumed care or control of the vehicle when he placed the keys in the ignition and turned on the headlights and the radio.

41. In the ex tempore judgment the Learned Magistrate said:

> *"The law provides that a person is in care and control of a vehicle where he has the immediate ability to drive that vehicle and the mischief targeted is to prevent people committing the offence of driving while impaired or under the influence of alcohol or drug or when they exceed the prescribed limit."*

In Canada, comparative statutory provisions have elicited similar policy statements regarding the purpose of the legislation. In the *R v Diotte (1991), 64 C.C.C (3d) 209 (N.B.C.A)* the Court of Appeal of New Brunswick considered an offence contrary to section 253 of the CCC 1985. Stratton CJ explained the object and purpose of section 253 of the CCC 1985 dealing with offences of driving or having care or control of vehicles when impaired. Stratton CJ quoted Lamer CJ in *R V Penno (1990) 80 C.R. (3d) 97* who said:

> *" The measure is part of the scheme set up by Parliament to protect the security and property of the public that are put to risk by persons whose ability to drive is impaired but who are, in any event, in care or control of a motor vehicle."*

Conclusion

42. For the above reasons, I dismiss the appellant's appeal.

Delroy B. Duncan, Assistant Justice
21 January 2019